Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

MEREDITH KILLINO and JOAN KILLINO,

Petitioners,

v.

RIVERSIDE SCHOOL DISTRICT, JOHN F. ROONEY, Superintendent JANET KRESGE, DEBORAH KAPLAN, JOHN VOYTKO, and JOSEPH MUCEYUNAS, teachers, JACK HELCOSKI, Supervisor of Pupil Personnel and J. DENNIS KRYZANOWSKI, Principal,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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47pp

QUESTIONS PRESENTED

I

Under Fed. Rules Civ. Proc. Rule 56(c) can summary judgment be granted when a genuine issue of material fact exists as to whether an Americans with Disabilities, Section 504, and Section 1983 plaintiff had been evaluated to determine the status, nature and extent of her disability?

II

Under the Americans with Disabilities Act can a summary judgment motion, premised on the assertion that the plaintiff has not been evaluated to determine the status, nature and extent of her disability, be granted when the plaintiff was previously regarded as being disabled?

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OPINIONS BELOW

The Memorandum of the District Court granting summary judgment is set out in the appendix at App. 9. The unreported opinion of the Third Circuit Court affirming the District Court's decision is set out in the appendix at App. 1. The denial of the petition for rehearing, unreported, is set out in the appendix at App. 21.

STATEMENT OF JURISDICTION

Meredith and Joan Killino commenced this action against Riverside et al. in the Middle District of Pennsylvania, under 29 U.S.C. §§ 1331, 1343, and 1367. The District court had jurisdiction because this case was filed pursuant to the first, ninth and fourteenth amendments to the Constitution of the United States and under Section 504 of the Rehabilitation Act of 1973, together with its implementing regulations, 34 C.F.R. § 104 and the implementing Pennsylvania State regulations at 22 Pa. Code, Chapter 15, the Americans with Disabilities Act and 42 U.S.C. § 1983 and the common law. On June 17, 1998 the District Court entered a final order dismissing the case pursuant to Riverside's Fed. Rules Civ. Proc. Rule 56(c) motion for summary judgment. That decision was timely appealed to the Third Circuit Court of Appeals and on August 16, 1999 an opinion was filed affirming the District Court's decision. A timely petition for rehearing was filed and denied on September 17, 1999. The Supreme Court granted an extension of time within to file a Petition for Writ of Certiorari to February 14, 2000. The Petition for Writ of Certiorari is being mailed this 14th

day of February 2000. This court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions of Fed. Rules Civ. Proc. are set out in the appendix at App. 27. Further, the relevant provisions of Section 504 of the Rehabilitation Act of 1973 are set forth in the appendix at App. 24 along with the relevant portion of the Americans with Disabilities Act at App. 23 and Section 1983 of the Civil Rights Act is set out at App. 24.

STATEMENT OF THE CASE

On December 8, 1995 Petitioners, Meredith and Joan Killino, brought an action against Respondents, Riverside School District ("Riverside") pursuant to the first, ninth and fourteenth amendments of the Constitution and under Section 504 of the Rehabilitation Act of 1973, Section 1983 of the Civil Rights Act and the Americans with Disabilities Act and pursuant to other state tort claims as well. The action seeks relief from Riverside's discrimination against Meredith, a minor, who attended their school. In January of 1992 Meredith was diagnosed by Dr. Lilik, a pediatric neurologist as suffering from Attention Deficit Disorder ("ADD"). A student who suffers from ADD is entitled to educational accommodations by statute. Although Meredith received some accommodations for her disability, Riverside did not comply with the

requirements of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act and its implementing regulation 34 C.F.R. § 104. Riversides refusal to comply with these statutes and regulations deprived Meredith of a free and appropriate public education.

Riversides school psychologist Dr. Balardi evaluated Meredith in September of 1994. The evaluation culminated in a draft service agreement designed to specifically accommodate Meredith's educational needs. App. at 14. Joan Killino repeatedly requested that Riverside sign and implement it but they refused. It was just that type of opposition from Riverside which forced the petitioners to seek various relief in the form of a state level due process administrative hearing. At issue in that proceeding was Riversides refusal to comply with the Americans with Disabilities Act, Section 504 of the Rehabilitation Act and its implementing Regulation 34 C.F.R. § 104. On September 25, 1995 Dr. Smith, the hearing officer, denied Meredith's claim. App. at 4. The result of that proceeding was merely the production of a record to show the disagreement, dispute, and conflict surrounding Meredith's battle to receive accommodations. Of the conflicts most pertinent to this case is the disagreement surrounding the 1994 evaluation. Through her testimony, Joan Killino characterizes the petitioners as being fully cooperative. Mr. Balardi, however, characterizes the petitioners as being uncooperative.

The December 8, 1995 action arises in part out of an appeal of Dr. Smith's ruling and also to seek relief for Riverside's discrimination against Meredith by refusing to comply with the statutes and regulations intended

insure that disabled students receive a free and appropriate public education. Surprisingly, on June 17, 1998 District Court Judge Caputo granted Riverside's motion for summary judgment. The motion was premised on the claim that because Meredith had not been evaluated to determine the status, nature, and extent of her disability a claim for relief based on her protected status must fail as a matter of law. The parties were in complete and utter disagreement on the evaluation issue, for which there is testimony and evidence to show the same. Nonetheless, the District Court made an inappropriate factual determination that Meredith was not evaluated and granted summary judgment on that determination. The Third Circuit Court affirmed that departure from the summary judgment standard in an opinion dated August 15, 1999. Further, the request for rehearing was denied on September 17, 1999.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Judicial Integrity and Public Importance

The Third Circuit has created an important question under Fed. Rules Civ. Proc. Rule 56(c) as to whether or not they can make a material fact determination and according to that finding decide a case as a matter of law. This court has made it clear that the judge's function in a summary judgment decision is not himself to determine the truth of the matter but to determine whether there is a genuine issue for trial *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Nonetheless, the Third Circuit acted in direct defiance of their function

when they made a material fact determination in this case and granted summary judgment according to that determination. In deciding a genuine issue of material fact, the Third Circuit has not only undermined the Federal Rules of Civil Procedure but it has also usurped the function of the jury.

The issues presented in this case are worthy of being considered by the Supreme Court because this Court has made it clear that summary judgment can not be granted when there are unresolved material fact issues. *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). The Third Circuit's disregard for this courts mandate should be addressed. More importantly, the abuse and undermining of the federal rules must be corrected to preserve the functioning of our system and deter future violations. When the Third Circuit becomes a rule breaker it breeds contempt for the rules and invites judges, practitioners, and parties alike to disregard the rules themselves.

The Third Circuit has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the District Court as to call for an exercise of this court's supervisory power under Supreme Court Rule 10(a). The Third Circuit did this by affirming the District Court's erroneous ruling and basing their decision of the case as a matter of law on a material fact determination either assumed from the lower court or made themselves. The departure and sanctioning present in this case is worthy of being addressed by the Supreme Court because the Court can send a signal to every judge and practitioner through one case. The lower court's determination of a genuine issue of

material fact in violation of the Federal Rules of Civil Procedure should not be tolerated by the Supreme Court.

In granting and affirming summary judgment the courts below have ruled in conflict with this court's holding that summary judgment cannot be granted when a genuine issue of material fact exists.

The genuine issue of material fact precluding summary judgment in this case is whether or not Meredith was evaluated to determine the status, nature and extent of her disability so that she may receive the accommodations required by the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973 and 42 U.S.C. § 1983. Summary judgment cannot be granted unless the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. Rules Civ. Proc. Rule 56(c) 28 U.S.C.A. "On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Incorporated*, 369 U.S. 654, 655, 82 S. Ct. 993, 994 (1962). Further, on summary judgment the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in her favor. *Adickes v. S. H. Kress & Company*, 398 U.S. 144, 158-159, 90 S. Ct. 1598, 1608-1609 (1970); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986); *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986); *Eastman Kodak v. Image Technical Services, Inc.*, 504 U.S.

451, 455, 112 S. Ct. 2072, 2076 (1991). Thus, all of Meredith's evidence is to be presumed correct and all inferences are to be drawn and viewed in her favor, as the nonmoving party. Moreover, the moving party, Riverside, has the burden of establishing the nonexistence of a genuine issue as to any material fact. *See Adickes v. S. H. Kress & Company*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970). Where a motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. Id. Riverside has not met their burden of establishing the absence of a genuine issue as to whether or not Meredith was evaluated and therefore it was inappropriate to grant summary judgment in this case.

Riverside contends that Meredith was never evaluated to determine the status, nature and extent of her disability. Contrarily, Meredith contends that she was evaluated by Riverside's school psychologist, Mr. Balardi. The evaluation, which commenced in September of 1994 and was completed in November of that same year, is evidenced by the draft service agreement Mr. Balardi prepared.[1] Joan Killino repeatedly requested Riverside sign and implement the service agreement. This is evidenced by the October 1995 letter.[2] Further, the record in this case includes testimony from Joan Killino which

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[1] A cursory review of the draft service agreement uncovers insight into Meredith's unique needs which could not be had without an evaluation.

[2] In that letter Joan Killino vehemently requested that Riverside implement the service agreement Mr. Balardi drafted.

reiterates Meredith's position that she cooperated with and had been evaluated by Mr. Balardi.[3]

Although, Riverside contends Meredith was never evaluated, an affidavit from Mr. Belardi to counter Meredith's position that she had been evaluated does not exist. To support their motion for summary judgment Riverside did, however, provide an affidavit from a school guidance counselor which makes no mention of the 1994 evaluation. Nonetheless, Riverside failed to meet their burden of establishing that no genuine issue exists as to the 1994 evaluation. When Meredith's evidence is presumed correct and all justifiable inferences from the above facts are drawn in the light most favorable to her, the only logical conclusion is that a genuine issue exists as to whether or not Meredith was evaluated. Therefore, summary judgment was inappropriate in this case because a genuine issue of material fact exists as to whether or not Meredith was evaluated to determine the status, nature and extent of her disability so that she may receive the accommodations required by the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973 and 42 U.S.C. § 1983, and etc.

The genuine dispute as to whether or not Meredith was evaluated is a material fact issue. A material fact is one which might affect the outcome in the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Summary judgment is precluded when a genuine issue exists as to a fact that might affect the

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[3] There is an abundance of testimony from Joan Killino which is in direct conflict with Riverside's version of the 1994 evaluation.

outcome of the case under governing law. *Id.*; Fed. Rules Civ. Proc. Rule 56(c) 28 U.S.C.A. A materiality determination rests on the substantive law; it is the substantive law that identifies the critical facts from the irrelevant facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Under the substantive discrimination and educational law including § 504 of the Rehabilitation Act of 1973 directly and by analogy the evaluation is a material fact issue. *See Andress v. Cleveland Independent School District*, 64 F.3d 176, 178-79 (5th Cir. 1995). Further, the U.S. Department of Education has issued a policy memorandum which states in part that in order to be eligible for § 504 accommodations the child must be evaluated.[4] Had a child refused a § 504 evaluation to determine their handicap status then a claim premised on their handicapped status and accommodation entitlement may fail as a matter of law. *See Gregory K. v. Longview School District*, 811 F.2d 1307, 1315 (9th Cir. 1987). The outcome of a § 504 claim can hinge on whether or not the child had been evaluated. Thus, evaluation is a material fact issue.

The substantive law indicates that Meredith's evaluation is a material fact issue because the outcome of this case hinges on whether or not Meredith had been evaluated, precluding summary judgment. Had there been a determination that Meredith was evaluated than Riverside would not be entitled to judgment as a matter of law. The issue is not merely one of irrelevance which would

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[4] 18 Indiv. Disabil. Educ. L. Rptr. 116 (1991). The memorandum applies to implementing section 504 protections and makes the evaluation central to the process.

not affect the outcome of the case but rather it is clearly the most critical fact issue at hand. The assertion that Meredith had not been evaluated is the premise upon which Riverside based its summary judgment motion. Without the inappropriate determination by the district court that Meredith had not been evaluated Riverside would not be entitled to judgment as a matter of law. Therefore, summary judgment should have been precluded because according to the substantive law, whether or not Meredith was evaluated is a material fact issue which has affected the outcome of this case.

The material fact dispute as to whether or not Meredith was evaluated is genuine. A fact dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). In *Anderson* this court explained the judge's role in deciding summary judgment motions:

> Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

Id.

This court further found that the genuine issue standard mirrors the standard for directed verdict under Federal Rule of Civil Procedure 50(a). A directed verdict should not be granted if reasonable minds could differ as to the import of the evidence. *See Wilkerson v. McCarthy,*

336 U.S. 53, 62, 69 S. Ct. 413, 417 (1949); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251, 106 S. Ct. 2505, 2511 (1986).

In light of the facts and evidence referenced above, mainly the service agreement, the Joan Killino request to implement it and the testimony of Joan Killino, a reasonable jury could conclude that Meredith was in fact evaluated by Mr. Balardi. Therefore, a genuine issue exists regarding the material fact that Riverside evaluated Meredith. The district court clearly was not following this court's directive as to the judge's function in ruling on a summary judgment motion. A lower court characterized the evaluation issue as debatable, nevertheless, the court concluded that an evaluation had not occurred and granted summary judgment on that determination. It is not the function of any lower court to weigh the evidence and determine the truth of the matter. The Third Circuit should have allowed a jury to determine whether or not Meredith had been evaluated.

Reasonable minds could differ on the issue of whether or not Meredith had been evaluated. Take for example the case of *Carroll v. Capalbo*, 563 F. Supp. 1053 (1983). There the court found in any event that a review by the school of the private medical evaluation and the preparation of an Individualized Education Plan itself qualified as an "evaluation" as the term is limned in the regulation. Here Meredith was diagnosed with "ADD" by a board certified pediatric neurologist and analogously a service agreement was prepared. Thus a reasonable mind could conclude that the 1994 Balardi assessment qualified as the required evaluation under the regulations.

The evaluation and assessment of Meredith as a handicapped or disabled student is analogous to the question of whether a rigging foreman had seamen status in *Southwest Marine Inc. v. Gizoni*, 502 U.S. 81, 112 S. Ct. 486 (1991). In that case a rigging foreman who was injured while working on a platform received benefits pursuant to the Longshore and Harbor Workers Compensation Act and also sought relief under the Jones Act. There it was held that an issue of fact existed as to the foreman's seaman status. *Southwest Marine Inc. v. Gizoni*, 502 U.S. 81, 92, 112 S. Ct. 486, 494 (1991). To qualify for relief under the Jones Act one must be classified as a seaman. Similarly, to qualify for relief under Section 504 of the Rehabilitation Act or the Americans with Disabilities Act classification as handicapped or disabled is required.

In *Southwest Marine* the Court explained that summary judgment was inappropriate because reasonable persons applying the proper legal standard could differ as to whether the employee was a member of the crew, a seaman, thereby making it a question for the jury. Just the same, in this case reasonable persons could differ as to whether Meredith had been evaluated, thereby making it a question for the jury. Since summary judgment was inappropriate for *Southwest Marine* it is inappropriate here.

An important question is left unanswered under the Americans with Disabilities Act as to whether a summary judgment motion, premised on the assertion that a plaintiff is not disabled, can be granted when the plaintiff was previously regarded as being disabled.

The Americans with Disabilities Act provides a three prong definition of the term disability. 42 U.S.C.A. § 12102(2). A child who qualifies under any prong is considered to be disabled. The first prong defines disability as any physical or mental impairment that substantially limits a major life activity such as learning. The second prong defines disability as having a record of such impairment. The third prong defines disability as being regarded as having such an impairment.

It is not certain from the lower courts if being regarded as having a disability places Meredith in the protected class for purposes of the Americans with Disabilities Act. The uncertainty exists because none of the lower courts addressed the Act. A possible presumption in this case is that being regarded as disabled is not sufficient to qualify for accommodations under the ADA. The presumption arises because Riverside regarded Meredith as having a disability, Attention Deficit Disorder. That is evidenced by the November 1995 Riverside memo that claims Meredith is to be considered a regular education student without accommodations. It would not be necessary to exclaim that Meredith is a regular education student unless she had previously been regarded by Riverside as being disabled. In spite of the fact that Meredith had been regarded as having a disability, the lower courts granted and affirmed summary judgment, which was premised in part on the assertion that she was not a

member of the protected class. Clarity and guidance is needed on the issue of who is disabled under the ADA and what is required to receive benefits thereunder.

The uncertainty from the lower court rulings allow further speculation. It could be presumed that an evaluation is not required and being regarded as disabled suffices for Meredith to be protected under the Americans with Disabilities Act. But further, it could be presumed the lower courts reasoned that even if Meredith were classified as disabled, her claim for protection would fail as a matter of law because an evaluation was needed to determine the appropriate type of accommodations. Once again the material fact issue of whether or not Meredith had been evaluated affected the outcome in this case. But for the inappropriate factual determination by the lower courts, Riverside would not have been entitled to judgment as a matter of law. Thus, Meredith's evaluation constitutes a genuine issue of material fact precluding summary judgment. Nevertheless, the alternate question still stands as to whether summary judgment can be granted under the Americans with Disabilities Act when a plaintiff is regarded as having a disability for which accommodations are required.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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UNREPORTED – NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7406

JOAN KILLINO; MEREDITH KILLINO, a minor by her natural parent and guardian, Joan Killino,

Appellants

v.

RIVERSIDE SCHOOL DISTRICT; JOHN F. ROONEY, Superintendent; JANET KRESGE, Teacher; DEBORAH KAPLAN, Teacher; JACK HELCOSKI, Supervisor of Pupil Personnel; J. DENNIS KRYZANOWSKI, Principal; JOHN VOYTKO, JOSEPH MUCEYUNAS

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civ. No. 95-cv-02083)
District Judge: Honorable A. Richard Caputo

Submitted Under Third Circuit LAR 34.1(a)
July 16, 1999

Before: SCIRICA, NYGAARD and ALITO, *Circuit Judges*

(Filed AUG 16 1999)

OPINION

PER CURIAM.

Appellants filed a complaint on December 8, 1995, alleging that appellees failed to provide reasonable

accommodations and adaptations to appellant Meredith Killino ("Meredith"), as required under federal law in light of Meredith's physical handicap, Attention Deficit Disorder ("ADD"). At the time the complaint was filed, Meredith was a student in the Riverside School District. In addition to claiming that appellees did not adequately accommodate Meredith, appellants maintain that appellees discriminated against Meredith when she was made to run twenty-five laps around the gym on two separate occasions when she forgot her gym clothes. Although appellants' amended complaint seeks declaratory relief and monetary damages, the parties have agreed that the suit is now for damages only.[1] By order entered June 17, 1998, the District Court granted appellees' motion for summary judgment. Appellants filed a timely notice of appeal.

I. Procedural History

This case has a long procedural history dating back to 1992. The dispute between appellants and the Riverside School District began when Meredith was in the seventh grade. During that year, Meredith began exhibiting learning and emotional problems. In January, 1992, Meredith was diagnosed by Dr. Lilik, a pediatric neurologist, as suffering from Attention Deficit Disorder. Meredith's parents then requested that the Riverside School District write a "service agreement" to develop the

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[1] Meredith graduated from high school shortly after appellants filed their amended complaint, and now attends a four year college. Meredith is no longer a minor.

accommodations, adaptations, and modifications in relation to Meredith's learning that her parents believed she was entitled to under both federal and Pennsylvania law. The school district believed, however, that further evaluations of Meredith were required to determine if she was in fact eligible for special education or related services under the applicable law. Meredith's parents disagreed with the school district's assessment that further evaluation of Meredith was required, and in May, 1992, filed suit in the United States District Court for the Middle District of Pennsylvania, together with three other students and their parents. The action was predicated primarily on the Individuals with Disabilities Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and 42 U.S.C. § 1983.

At this point, the Riverside School District sought permission from the educational authorities of the Commonwealth of Pennsylvania to conduct a comprehensive evaluation of Meredith to determine whether she was eligible for special education and related services under IDEA and 22 Pa. Code, Chapter 14; or whether she was a protected student under § 504 of the Rehabilitation Act. After a due process hearing, a Pennsylvania Special Education Hearing Officer granted the school district's request for a comprehensive evaluation of Meredith. The parents appealed. A Special Education Appeal Panel affirmed the decision of the hearing officer. The parents then sought relief from the District Court, and the action was consolidated with the action previously filed in the District Court. The District Court granted the school district's motion to dismiss, reasoning that § 1415(f) of IDEA required that the plaintiffs exhaust administrative

remedies provided for under the Act. *Killino v. Riverside School District*, Civ. No. 92-cv-0739 (M.D. Pa. September 3, 1993) ("*Killino I*").

Meredith's parents continued to refuse to allow the school district to evaluate their daughter. In June, 1994, they filed a second action in District Court asserting similar allegations as those raised in the first suit. Once again, the District Court granted the school district's motion to dismiss for failure to exhaust administrative remedies. *Killino v. Riverside School District*, Civ. No. 94-cv-1018 (M.D. Pa. January 3, 1995) ("*Killino II*"). In response, Meredith's parents requested a due process hearing in accordance with § 1415 of IDEA. The issue before the hearing officer was whether Meredith was discriminated against when she was made to run laps for forgetting her gym clothes on February 14, 1994, and March 7, 1994, because forgetfulness was a manifestation of her handicap, namely ADD. The hearing officer ruled that because the required evaluations of Meredith had not occurred due to her parents' refusal to allow the school district to conduct the evaluations, Meredith was neither classified as an eligible student under IDEA, nor a protected handicapped student under Section 504, at the time of the alleged discrimination. Consequently, any claim of discrimination on the basis of Meredith's handicap was invalid.

The decision of the hearing officer was unanimously affirmed by the appeal review panel. Meredith's parents continued to resist all attempts made by the school district to evaluate Meredith to determine her eligibility for special services. Instead, appellants initiated this action by once again filing suit in the United States District

Court for the Middle District of Pennsylvania. The basic allegations are the same as in the previous two lawsuits, plus additional claims against two teachers who taught Meredith in the seventh and tenth grades.[2]

II. Standard of Review

We exercise plenary review over a District Court's grant of summary judgment. A grant of summary judgment will be affirmed if our review reveals that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We review the facts in the light most favorable to the party against whom summary judgment was entered. *See Coolspring Stone Supply, Inc. v. American States Life Ins. Co.*, 10 F.3d 144, 146 (3d Cir. 1993).

III. Discussion

In their briefs, appellants concede that Meredith is not eligible for IDEA services and seek relief based upon § 504 of the rehabilitation Act. Appellants maintain that the evaluations the school district requested to perform were therefore not required and hence Meredith was protected under § 504 when she was medically diagnosed

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[2] It is unclear whether appellants have exhausted administrative remedies as to the claims against these two teachers. Because we conclude that no genuine issue of material fact exists, however, we will affirm the District Court's dismissal of the complaint on that basis.

with ADD in 1992. After reviewing § 504 and its implementing regulations, we agree with every administrative panel which has reviewed this case, as well as with the District Court, that both § 504 and IDEA require a preplacement evaluation the likes of which Meredith never received due to a complete refusal on the part of Meredith and her parents to submit to evaluations requested by the school district and ordered by two separate special education appeals panels.

The Rehabilitation Act of 1973 prohibits discrimination of the basis of a disability in federally funded programs. In order to establish a violation of § 504, appellants must establish that: (1) Meredith was a "handicapped person" as defined by the Act; (2) Meredith was "otherwise qualified" to participate in school activities; (3) the school or the board of education received federal financial assistance; and (4) Meredith was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. *See Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 253 (3d Cir. 1999). A "handicapped person" is described as any person who has a physical or mental impairment which substantially limits a major life activity (e.g., learning). 34 C.F.R. § 104.3(j). Appellants assert that because Meredith was medically diagnosed as having ADD, she is a "handicapped person" within the meaning of § 504 and entitled to its protections.

The regulations implementing § 504 of the Act provide:

> (a) Preplacement evaluation. A Recipient that operates a public elementary or secondary education program shall conduct an evaluation in

> accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.
>
> (b) Evaluation procedures. A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services . . .

34 C.F.R. § 104.35. A preplacement evaluation is thus mandatory to determine whether a person qualifies for § 504 services. The school district is afforded discretion to determine the standards and procedures for the preplacement evaluation. In evaluating a child, the school must "draw upon information from a variety of sources." 34 C.F.R. § 104.35(c). These sources included aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior. *Id.*

In addition, the Department of Education has issued a policy memorandum clarifying the circumstances under which children with ADD are eligible for special education services under IDEA and § 504. In regard to § 504, the Department states that depending on the severity of their condition, a child with ADD *may* fit within the definition of "handicapped person." Furthermore, "if parents believe that their child is handicapped by ADD, the LEA must evaluate the child to determine whether he or

she is handicapped as defined by Section 504." Joint Policy Memorandum, Sept. 16, 1991, U.S.D.E., reprinted in 18 Indiv. Disabil. Educ. L. Rptr. at 118. Because appellants refused to permit Riverside School District to evaluate Meredith in a manner which would enable it to make a determination as to whether Meredith's ADD was of sufficient severity to qualify her as a "handicapped person" within the meaning of § 504, she is not entitled to enforce rights available only to those who have been deemed eligible under § 504.

In so far as appellants amended complaint seeks damages for violation of 42 U.S.C. § 1983 and other asserted rights, these claims fail to raise a genuine issue of material fact.[3]

IV. Conclusion

Because the record reveals that no genuine issue of fact exists as to whether Meredith was evaluated to determine whether she was a "handicapped person" within the meaning of § 504, we will affirm the order of the District Court.

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[3] For example, appellants allege that "[a]s a result of the School District's custom and policy, other students were provided accommodations without any testing or identification that the minor Plaintiff was required to undergo after her accommodations were taken away." Amended complaint at 13. Appellants have not demonstrated that a genuine issue of material fact exists as they have produced no evidence in support of their claim. Vague and ambiguous claims cannot defeat a motion for summary judgment. *See Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 254 (3d Cir. 1999).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MEREDITH KILLINO, ET AL.,	:	
Plaintiffs,	:	3:95-CV-2083
vs.	:	(JUDGE CAPUTO)
RIVERSIDE SCHOOL DISTRICT, ET AL.,	:	
Defendants.	:	

MEMORANDUM

(Filed Jun. 17, 1998)

Plaintiffs filed the present action on December 8, 1995, alleging that defendants failed to provide Meredith, a minor at the time, who was medically diagnosed with Attention Deficit Disorder ("ADD"), with reasonable accommodations and adaptations as required under federal law.[1] Before the Court is defendants' motion for summary judgment. The case has been referred to United States Magistrate Judge Raymond J. Durkin. After hearing oral argument on defendants' motion, the Magistrate Judge issued a Report and Recommendation that defendants' motion for summary judgment be granted. Pursuant to Local Rule 72.3, plaintiffs have filed objections to

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[1] Since the filing of the complaint, Meredith has graduated from high school and is now attending a four-year college. Accordingly, the request for declaratory relief has been dropped and the parties agree that this action is now one for damages only.

the Report and Recommendation. Defendants have filed a reply to plaintiffs' objections.

I. PROCEDURAL HISTORY

This case has a long and complicated procedural history. While Meredith was in seventh grade, a dispute arose between the school district and Meredith's parents as to whether the school district had sufficient data to write a "service agreement" to develop the adaptations, accommodations and modifications required for Meredith in regular education as well as an in-service training program for the faculty and staff.[2] (Rep. & Recommendation at 6.) The school district believed further evaluations were necessary, and Meredith's parents disagreed.

In May of 1992, toward the end of Meredith's seventh grade year, plaintiffs initiated an action in the United States District Court for the Middle District of Pennsylvania, together with three of the students and their parents. The action was predicated primarily on the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and the Civil Rights Act, 42 U.S.C. § 1983.

At this point, the school district sought permission from the educational authorities of the Commonwealth of Pennsylvania to conduct a comprehensive evaluation of

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[2] As there have been no objections to the Report and Recommendation's review of the procedural history of this case, we will briefly summarize the procedural history discussed in greater length in the Report.

Meredith to determine whether she was an eligible student entitled to special education and related services under IDEA and 22 Pa. Code, Chapter 14; or a protected handicapped student under § 504 of the Rehabilitation Act. After a hearing, a Pennsylvania Special Education Hearing Officer granted the school district's request for a comprehensive evaluation of Meredith. The parents appealed and the Appeals Panel affirmed the decision in favor of the school district. The parents thereafter appealed the ruling of the Appeals Panel, and the appeal was consolidated with the action previously filed in this district court.

On September 3, 1993, the district court granted the school district's motion to dismiss, reasoning that section 1415(f) required the plaintiffs to first exhaust the elaborate administrative remedies provided under IDEA. *See Killino v. Riverside School District*, No. 92-CV-0739 (M.D. Pa. September 3, 1993) (*"Killino I"*).

After the decision, the parents continued to refuse to allow the school district to evaluate Meredith. Instead, plaintiffs filed a second action in June 1994, asserting similar allegations. The court again granted the school district's motion to dismiss for failure to exhaust administrative remedies. *Killino v. Riverside School District*, No. 94-1018 (M.D. Pa. Jan. 3, 1995) (*"Killino II"*).

In response to the district court's second ruling, plaintiffs requested a due process hearing in accordance with § 1415 of IDEA. On September 25, 1995, the hearing officer ruled that Meredith could not be considered a protected handicapped student under Section 504 in light of the persistent refusal of Meredith and her parents to

submit to an evaluation to determine Meredith's need for education accommodations. An appeals review panel held:

> the fact remains that Meredith still has not been evaluated. Absent such an evaluation, the District and this Panel are without authority to declare that Meredith is an eligible student under IDEA or a protected handicapped student under Section 504. Until such time as Meredith's comprehensive evaluation is completed, and the multi-disciplinary team arrives at a decision concerning her status, Meredith's pendent placement will remain what it is today – in regular education.

After this decision, Dr. John Rooney, the Superintendent, informed Meredith's teachers that Meredith, now in eleventh grade, was to be considered a regular student without adaptations.

II. STANDARD OF REVIEW

When objections are filed to a Report and Recommendation of a Magistrate Judge, the court must make a *de novo* determination of those portions of the Report to which objections are made. 28 U.S.C. § 636(b)(1)(C); *Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989); *Owens v. Beard*, 829 F. Supp. 736, 738 (M.D. Pa. 1993). The court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. 28 U.S.C. § 636 (b)(1); *Owens*, 829 F. Supp. at 738. Although the review is *de novo*, the court is permitted by statute to rely on the Magistrate Judge's proposed recommendations to the extent the court, in the exercise of

sound discretion, deems proper. *United States v. Raddatz*, 447 U.S. 667, 676, 100 S. Ct. 2406, 2413 (1980); *Goney v. Clark*, 749 F.2d 5, 7 (3d Cir. 1984); *Ball v. United States Parole Commission*, 849 F. Supp. 328, 330 (M.D. Pa. 1994).

III. DISCUSSION

The express language of the regulations of the United States Department of Education implementing Section 504, provides:

> a) Preplacement evaluation
>
> A recipient that operates a public elementary or secondary education program *shall* conduct an evaluation in accordance with the requirements of paragraph (b) . . . *before taking any action* with respect to the initial placement of the person in a regular or special education program. . . .

34 C.F.R. § 104.35(a) (emphasis added).

In addition, the Department of Education issued a policy memorandum to clarify the circumstances under which children with ADD are eligible for special education services under both the IDEA and Section 504, stating:

> [State and local educational agencies] have an affirmative obligation to evaluate a child who is suspected of having a disability to determine the child's need for special education and related services. . . .
>
> A [local equational agent ("LEA")] may not refuse to evaluate the possible need for special education and related services of a child with a prior medical diagnosis of ADD solely by reason

> of that medical diagnosis. However, a medical diagnosis of ADD alone is not sufficient to render a child eligible for services under Part B. . . .
>
> Under Section 504, if parents believe that their child is handicapped by ADD, the LEA must evaluate the child to determine whether he or she is handicapped as defined by Section 504.

Joint Policy Memorandum, Sept. 16, 1991, U.S.D.E., reprinted in 18 Indiv. Disabil. Educ. L. Rptr. at 118.

Based on the foregoing, the Magistrate Judge concluded that a preplacement evaluation is required to determine eligibility for services and accommodations under IDEA and Section 504. Because plaintiffs refused to permit Meredith to undergo the evaluation, the Magistrate Judge recommended that defendant's motion for summary judgment be granted.

The Court must review *de novo* those portions of the Report to which objections are made. *See* 28 U.S.C. § 636 (b)(1)(C). We will therefore address each of plaintiffs' objections separately. For the sake of convenience, we will assume the parties are familiar with the analysis in the Report and Recommendation.

A. The "Service Agreement"

Plaintiffs object to the finding by the Magistrate Judge that Mr. Bilardi, an independent psychologist, was unable to complete an evaluation on Meredith. Plaintiffs contend that a draft of a "service agreement" under Section 504, to identify and provide accommodations for Meredith, was completed by Mr. Bilardi; but that the school district refused to sign the service agreement.

Plaintiffs, however, have not submitted any evidence to support this argument. Plaintiffs point to the affidavit of Jack Helcoski, the local educational agent for the school district, who testified that he did meet with Mr. Bilardi about starting an informal evaluation and drafting a service agreement. Nevertheless, such evidence does not establish that the school district was at fault for the failure to execute the service agreement. Indeed, the testimony presented is to the contrary. Mr. Bilardi testified that the attempt to reach a compromise in the form of a service agreement failed because of Mrs. Killino, not the school district:

> So I took Mrs. Killino's ideas, data from the rating scales and I put together a draft document in the format of a service agreement. I had sent Mrs. Killino a copy. I had given the district a copy. And I retained a copy in my word processor so it was just open.
>
> What is was was that Mrs. Killino was going to get back to me with corrections, additions, slashes, or whatever that needed to be on there. That didn't work out. I didn't receive a corrected copy or a copy that she had worked on.

(Doc. No. 29, Rec. of second due process hearing at 290-91.)

Thus, there is no genuine issue of material fact as to whether the school district was at fault for the failed service agreement. Moreover, we agree with the Magistrate Judge that any attempt to negotiate a settlement by executing a service agreement does not indicate recognition by the school district that an evaluation of Meredith

was not really necessary. *See Dubois v. Connecticut State Bd. of Educ.*, 727 F.2d 44, 48-49 (2d Cir. 1984).

Finally, considering the restrictions placed on Mr. Bilardi in drafting the service agreement, it is debatable whether the school district should have used it as a substitute for the required evaluation. For example, Mr. Bilardi testified that he was very limited in his ability to develop a program for Meredith:

> The parameters in which I was given parental agreement that I could work with were very narrow. I could not work individually with Meredith. I could not observe her in the classroom . . . it was decided that I would only speak with the teachers in the presence of Mrs. Killino. I was not given, I would think, general permission to review the extensive records.

(Doc. No 29, Rec. of second due process hearing at 280-81.)

Accordingly, we find no error in the Magistrate Judge's finding that Mr. Bilardi was unable to complete an evaluation of Meredith.

B. Dr. Lilik's Examination

In response to defendants' motion, plaintiffs point out that the hearing officer found the diagnosis and evaluation by Meredith's physician, Dr. Lilik, sufficient with respect to the medical portion of the evaluation. Plaintiffs therefore argue that because Meredith's ADD was a physical impairment, further evaluations were not necessary. The Magistrate Judge rejected this argument stating:

> the hearing officer specifically provided that Dr. Lilik's evaluation would suffice *only* for the *medical* assessment portion of the process, and for Meredith to be found entitled to the accommodations she sought, the law requires other types of evaluation such as psychological, educational, social and emotional evaluations which Meredith and her parents specifically refused.

(Rep. & Recommendation at 18) (emphasis in original).

Plaintiffs object to this finding. Plaintiffs assert that nowhere in Section 504 is the all-encompassing evaluation proposed by the school district required. We disagree. Section 504 provides that school districts must consider a variety of sources in making placement decisions, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. *See* 34 C.F.R. § 104.35(c)(1). Moreover, the policy memorandum issued by the Department of Education specifically provides that a medical diagnosis of ADD alone is insufficient to render a child eligible for special education services under both IDEA and Section 504. Joint Policy Memorandum, Sept. 16, 1991, U.S.C.E., reprinted in 18 Indiv. Disabil. Educ. L. Rptr. at 118. Accordingly, there is no genuine issue of material fact as to whether Dr. Lilik's diagnosis and medical evaluation was sufficient to render Meredith eligible under IDEA and Section 504.

C. Voluntary Accommodations by Teachers

The Magistrate Judge found that even though some teachers voluntarily afforded Meredith accommodations, this did not raise a genuine issue of material fact as to

whether Meredith was eligible under IDEA and Section 504, and therefore entitled to those accommodations. Plaintiffs object to this finding and argue that they have documented that Meredith was specifically provided accommodations. Plaintiffs further contend that other students were provided accommodations without being required to undergo an evaluation.

We fail to see how the fact that some teachers voluntarily chose to provide Meredith and other students with accommodations obviates the statutory requirement that Meredith undergo a preplacement evaluation. Plaintiffs seek to enforce rights available only to those who are determined to be eligible under IDEA and Section 504. In order to be eligible, the regulations of the Department of Education specifically require that a school district conduct an evaluation. See 34 C.F.R. § 104.35(a). Due to plaintiffs' refusal to permit Meredith to be evaluated, Meredith was not eligible to receive accommodations under IDEA and Section 504. We agree with the Magistrate Judge that voluntary accommodations by some teachers do not waive the requirement that Meredith be evaluated and create an entitlement to those accommodations.

D. Who Determines the Content of the Evaluation

In the Report and Recommendation, the Magistrate Judge found that Mrs. Killino did identify one single test, the TOVA,which "would probably be a very viable measure." (Rep. & Recommendation at 20.) Nevertheless, the Magistrate Judge concluded that nothing in either IDEA or Section 504 affords parents the standing to dictate the

content of a preplacement evaluation. Plaintiffs object to this finding. Plaintiffs contend that whether they "dictated" the content or tried to be a part of it are clearly issues of triable fact.

We agree with the Magistrate Judge that the language of the implementing regulations provides the school district with the discretion to determine the standards and procedures for the preplacement evaluation. *See* 34 C.F.R. § 104.35(b); 34 C.F.R. § 300.531-532.[3] Moreover, as discussed above, a determination under IDEA and Section 504 cannot rest on a single test or assessment technique. Despite plaintiffs' approval of the TOVA, the school district is required to conduct an evaluation from a variety of sources including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. *See* 34 C.F.R. § 104.35(c)(1); 34 C.F.R. § 300.532(d).

Plaintiffs seek to enforce rights available only to students who are entitled to special education and related services under IDEA and Section 504. When Meredith was in school, however, plaintiffs consistently refused to allow her to undergo a preplacement evaluation to determine whether she was eligible for such accommodations under IDEA or Section 504. Because plaintiffs precluded

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[3] Under the regulations, parents do have the opportunity to challenge the proposed evaluation in a hearing. *See* 34 C.F.R. § 104.36. Plaintiffs, however, have twice had the opportunity to present their objections in due process hearings and both times the hearing officers ruled that an evaluation of Meredith was required.

the school district from completing the required evaluation, plaintiffs cannot not claim that the school district failed to provide accommodations contrary to federal law. Accordingly, the Magistrate Judge' Report and Recommendation will be adopted. Defendants' motion for summary judgment will be granted.

An appropriate order will follow.

June 17, 1998
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7406

JOAN KILLINO; MEREDITH KILLINO,
a minor by her natural parent and
guardian, Joan Killino,

Appellants

v.

RIVERSIDE SCHOOL DISTRICT; JOHN F. ROONEY, Superintendent; JANET KRESGE, Teacher; DEBORAH KAPLAN, Teacher; JACK HELCOSKI, Supervisor of Pupil Personnel; J. DENNIS KRYZANOWSKI, Principal; JOHN VOYTKO; JOSEPH MUCEYUNAS

(D.C. Civ. No. 95-cv-02083)

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*,
SLOVITER, MANSMANN, GREENBERG, SCIRICA,
NYGAARD, ALITO, ROTH, McKEE and
RENDELL, *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ Illegible
Circuit Judge

Dated: SEP 17 1999
lmc/cc: Ms. MK
Ms. JK
AEF

42 U.S.C.A. § 12102

As used in this chapter:

* * *

(2) Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

* * *

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42 U.S.C.A. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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29 U.S.C.A. § 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of

each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of –

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship –

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of

sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

Fed. R. Civ. P. 56. Summary Judgment

* * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *